IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISIDICTION

WRIT PETITION NO.1363 OF 2005

Royal Western India Turf Club Ltd. ..Petitioner

Vs.

The Employees State Insurance Corporation and Ors. ..Respondents

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Mr.J.P.Cama senior counsel with Mr.Talreja i/b Haresh Mehta and Co. for Petitioner
Mr.H.V.Mehta for Respondent no.1

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CORAM : B.H.MARLAPALLE,J.
DATE : MARCH 21,2005

P.C.:

1. Heard Mr.J.P.Cama, senior counsel with Mr.Talreja for the petitioner and Mr.Mehta, the learned counsel for the respondent no.1

2. The respondents nos.1 to 3 had sought to recover an amount of Rs.9,43,076/- by way of arrears towards the contribution payable under the Employees Insurance Act 1948 and the Scheme thereunder. This recovery order came to be challenged in Application (ESI) No. 2 of 1988 filed under Section 75 of the said Act before the Employees Insurance Court at Mumbai and by judgment and order dated 17.2.2005, the application was dismissed. Hence, this petition.

3. To the objection of maintainability of this petition as raised by Mr.Mehta, the learned counsel Mr.J.P.Cama, has referred to the decision of this Court in the case of *Employees State Insurance Corporation, Bombay V. Western India Theatres Ltd. Bombay [1995 II CLR 459]* holding that whether a particular category of workers falls within the meaning of an employee as defined under the E.S.I.Act or not is a question of fact and therefore, no substantial question of law is involved in the challenge raised to the order passed by the Employees Insurance Court. He also referred to the following decisions of the Supreme Court:

1. *Calcutta Discount Company Ltd. Vs. Income Tax Officer, Companies District I. Calcutta and another; [AIR 1961 S.C. 374]*
2. *Pradip Port Trust Vs. Sales Tax Officer and others; [(1998) 4 S.C.C. 90]*
3. *Whirlpool Corporation Vs. Registrar of Trade Marks Mumbai and others; [AIR 1999 SC 22].*

. Mr.J.P.Cama also placed reliance on the decision of the Division Bench of the Calcutta High Court in the case of *Subhash Chandra Bose and others Vs. Employees State Insurance Corporation and others [1990 (60.) FLR 539].*

4. The E.S.I. Court in the impugned judgment framed the following issues for adjudication and answered them accordingly.

1. Does the applicant prove that the claims made by the E.S.I. Corporation against it are barred by res-judicata ?

   No.

2. Does the applicant further prove that payments made by it, as referred by ESI Authority in its Notices dated 23.4.1987 and 16.11.1987 do not amount to be 'wages' within the meaning of Section 2(22) of the ESI Act 1948?

   No.

3. Does the Applicant further prove that the orders passed by ESI Authority under Section-45A of the Act, determining (i) contributions of Rs.4,28,481-80 for the period from 1978 to 1982-83 and interest of Rs.83,747-50 upto September, 1987 and (ii) contributions of Rs.9,43,076-60 for the period from 1978 to 1982-83 and interest of Rs.1,84,326-25 upto September, 1987, are not proper, legal, valid and in accordance with law ?

   No.

4. Does applicant prove that it is not liable to pay all those contributions and interest along with future interest as asked by ESI Authorities ?

   No.

5. To what reliefs applicant is entitled to ?

   Applicant is not entitled for any

relief.

6. What order ?

5. On the face of the issues framed and adjudicated by the Employees Insurance Court and the remedy of appeal under Section 82 of the E.S.I.Act, it would not be expedient to entertain the petition under Articles 226 and 227 of the Constitution of India on the basis of the presumption that no substantial question of law is involved. Mr.J.P.Cama submitted that in this petition though questions of law both on the point of fact as well as law, are raised for the consideration of this Court but the petition does not raise any substantial questions of law. In this regard, I may usefully refer to the following observations in the case of *Santosh Hazari Vs. Purushottam Tiwari (deceased by L.Rs.) [(2001) 3 S.C.C. 179]*:

. "A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for

> the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity or avoiding prolongation in the life of any lis."

6. When an appeal is presented before this Court under Section 82 of the E.S.I. Act, the issue of substantial question of law would be considered on the lines of the observations made in *Santosh Hazari's* case and the contentions of the petitioner that the petition should be straightway entertained under Articles 226 and 227 of the Constitution of India, cannot be entertained when a statutory remedy of appeal is available against the impugned order. In this view, I am supported by law laid down in the case of *Sadhana Lodh Vs. National Insurance Company Ltd. [A.I.R. 2003 S.C. 1561].* The issue raised by Mr.Cama has also been decided by this Court (Single Bench) in the case of *Rainbow Industries Mumbai Vs. Regional Director, E.S.I. Corporation, Mumbai [2001(3) Mh.L.J. 508].*

6. The petition is therefore, disposed of as not tenable and the petitioner is at liberty to file an appeal under Section 82 of the Act. If such an appeal is filed within a period of two weeks from today, the undertaking given by the respondents nos.

1 to 3, not to take any coercive steps against the petitioner, will operate till then.

[B.H.MARLAPALLE,J.]